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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE FLORES et al.,

Defendants and Appellants.

E047165

(Super.Ct.No. RIF086449)

OPINION

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge.

Affirmed as modified.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant George Flores.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant Joe Lorenzo Moreno.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda Cartwright-Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

In May 1999, defendants Joe Lorenzo Moreno and George Flores admittedly shot and killed Ralph Avila.

The prosecution evidence indicated that defendants participated in a drug sale, then pulled out their guns and tried to rob those present of their “watch and wallets and money or whatever”; Ralph Avila resisted, so they shot him.

In stark contrast, the defense evidence indicated that Ralph Avila pulled out what appeared to be a gun or other weapon and tried to rob defendants of their remaining “dope”; they shot him in self-defense or, at a minimum, either in imperfect self-defense or in a sudden quarrel or heat of passion so as to reduce murder to voluntary manslaughter.

In a previous trial, the jury found defendants not guilty of first degree murder (which the prosecution presented, alternatively, on both a premeditation and deliberation theory and a felony-murder theory), but guilty of second degree murder. In a previous appeal, we reversed, holding, among other things, that the trial court had erred by refusing to instruct on the heat of passion theory of voluntary manslaughter. (*People v. Flores* (Oct. 21, 2003, E031344) [nonpub. opn.].)

In the second trial, the jury once again found defendants guilty of second degree murder. (Pen. Code, § 187, subd. (a).) It also found true both a gang enhancement (Pen. Code, § 186.22, subd. (b)) and an enhancement for personally discharging a firearm and causing death (Pen. Code, § 12022.53, subd. (d)). Both defendants were sentenced to 43 years to life in prison.

Defendants appeal, contending that:

1. The trial court erroneously modified the standard heat of passion instruction.
2. The trial court erred by instructing that a defendant cannot claim perfect or imperfect self-defense if he created circumstances that legally justified his adversary's attack.
3. Defendants' trial counsel rendered constitutionally ineffective assistance by failing to move to bifurcate the gang enhancement.
4. There was insufficient evidence to support the gang enhancement.
5. The trial court erred by imposing a three-year term on the gang enhancement, instead of using the gang enhancement to trigger a 15-year minimum parole period.

The People concede that the trial court erred by imposing a three-year term on the gang enhancement. Hence, we will modify the judgment. Otherwise, we find no prejudicial error. We will therefore affirm the judgment as modified.

I

FACTUAL BACKGROUND

A. *The Case for the Prosecution.*

1. *Richard Avila's testimony.*

As of May 1999, Richard Avila was 17 years old. He was using methamphetamine daily. He met John ("Johnno") Morales for the first time about a week before the shooting, when one of his usual methamphetamine suppliers referred him to Morales. Richard arranged for his friend and neighbor, Joe Virgen, to buy methamphetamine from Morales. Richard knew that Morales belonged to a gang, but he did not know which one.

On May 28, 1999, Virgen asked Richard to contact Morales so he could buy some more methamphetamine. Virgen had \$1,000 and wanted to buy an ounce. Richard phoned Morales, who agreed to deliver the methamphetamine to Virgen's house.

Richard arrived at Virgen's house around 9:00 p.m. Around 10:00 p.m., Richard's older brother Ralph Avila also arrived. Richard told Ralph about the upcoming drug deal; because Ralph did not approve of him using methamphetamine, he felt he had to. Neither Richard, Ralph, nor Virgen was involved with any gang.

Morales arrived unexpectedly late — sometime after 1:45 a.m. Also unexpectedly, he was accompanied by two other men — defendant Flores (introduced as "Spooky") and defendant Moreno (introduced as "Huero Joe"). Morales had about an ounce of methamphetamine in a plastic bag. All five men hung out in the living room, drinking beer and (except for Ralph) smoking some of the methamphetamine.

After 15 or 30 minutes, Virgen and Morales both left the room. According to Richard, they went to the kitchen together. Shortly after they left, he testified, both defendants pulled out guns. Flores had a semiautomatic; Moreno had a revolver. They said, "Give me your stuff and get on the fucking floor."

Ralph tried to grab Moreno's gun, but he was too far away. Ralph tried to calm defendants down. Defendants told the brothers to go to the corner and get on the floor or they were going to die. Richard knelt in the corner. Ralph, however, sat down in a chair instead.

Defendants demanded the brothers' wallets and watches. Flores took Richard's wallet (which contained \$20 or \$25) out of his pocket. Ralph, however, refused to comply. He made another unsuccessful grab for Moreno's gun. Then he walked out a sliding glass door into the back yard. Defendants told Ralph to stop or they would shoot him, but he ignored them.

At some point, Moreno left the living room and went into the back bedroom briefly. Also at some point, Richard looked down the hall and saw Morales — who was holding a gun — pushing Virgen into the bathtub.

After being gone less than a minute, Ralph came back inside. "He tried to calm them down some more" When that failed, however, he said, "Fuck it, Rich." He put up his hands "[l]ike a boxer" and started to walk toward defendants. Ralph was six feet seven inches tall and weighed about 280 pounds. Moreno was five feet eight inches tall and weighed somewhere between 115 and 150 pounds; Flores was five feet six inches tall and weighed about 145 or 150 pounds.

Defendants lined up side by side, pointed their guns at Ralph, and said, "Stop or I am going to blast you." As Ralph kept walking toward them, defendants backed down the hallway toward the front door. The whole group went out of Richard's sight.

A second or two later, Richard heard gunshots. He then saw Morales, still holding a gun, run out of the back bedroom and toward the front door. Richard got up and found Ralph lying on the front porch. He ran into the master bedroom and called 911.

Richard admittedly lied to the first police officer who interviewed him; he denied that there had been any drug deal or that he had been drinking or using methamphetamine. However, when a second officer interviewed him, about 10 minutes later, he told the whole truth.

2. *Virgen's testimony.*

Virgen's testimony differed from Richard's in some respects. He denied any knowledge of a drug deal. He understood that Morales and defendants were friends of Richard, who had invited them to come over.

According to Virgen, he went to the bedroom to make a phone call. As he was reaching for the phone, someone came up behind him, put a gun up to his head, and said, "Give me your money, or I will shoot you." Virgen gave him his wallet (containing over \$1,100). The gunman also demanded guns and jewelry. Virgen said he did not have any.

Meanwhile, Virgen heard a "commotion" in the living room; someone said, "Give me your money." The gunman rummaged around the bedroom, including in the closet. Later, the police found Morales's fingerprint on an ammunition box in the closet.

At some point, another person came into the bedroom briefly, then left. Just moments after that, Virgen heard shots. The gunman ran out. Virgen hid in the bathroom. He denied being pushed into the bathtub.

3. *Additional prosecution evidence.*

Ralph had been struck by five bullets. Two were small caliber; three were medium caliber. Four bullets were recovered from his body. The fifth, a small caliber bullet, had

exited and was found in the living room. Two .25-caliber semiautomatic bullet casings were found in the front doorway. Ralph died of these wounds. Tests showed that his blood alcohol level was 0.19 percent and that he had not used methamphetamine. The police searched the house but found no guns and no methamphetamine.

The next day, May 29, 1999, Morales was arrested; he had \$1,268 in his pocket. Moreno was arrested on July 11 or 12, 1999. On July 25, 1999, a police officer stopped Flores's car, but he ran and got away. He was eventually arrested on December 27, 1999.

4. *Gang evidence.*

Detective Steven Skahill, a gang expert, identified Puente 13 as a Hispanic gang active in La Puente. Its primary activities included "everything from selling narcotics, . . . using guns, possessing firearms, stealing cars, murder, drive-by shootings Everything you can think of."

Two members of Puente 13, Nicholas "Slick Nick" Rodriguez and Arthur Torres, had been convicted of kidnapping, torture, and two counts of murder. A third member, Alfred "Dinky" Gutierrez, had been convicted of murder and attempted murder.

In Detective Skahill's opinion, Morales, Flores, and Moreno were all members of Puente 13. Morales had many tattoos, including "DB" (for "Dial Boulevard," a Puente clique) on the side of his face and the word "Puente" on the back of his head. Flores, too, had several tattoos, including the word "Puente" on the side of his face and the number "13" in the middle of his forehead.

When asked to assume, hypothetically, certain key facts of this case, Detective Skahill opined that “that offense” was committed for the benefit of the gang, because “gangs . . . provide money for their existence . . . by selling narcotics . . . [and] committing robberies” In addition, gangs rely on respect to intimidate rival gangs and others in the neighborhood. The refusal to comply with the orders of a gang member, even when he had a gun, would be viewed as disrespect. Gang members are likely to respond to disrespect with violence.

Detective Skahill added that the crime was also committed in association with other gang members because “[t]he gang members all went out there with the idea of supporting each other in the commission of a robbery.” Gang members commit crimes with other gang members “because they are not going to rat you out. They are going to back you up.”

B. *The Case for the Defense.*

Both defendants testified on their own behalf. Their testimony was largely consistent, with minor exceptions.

Flores admitted being a member of Puente 13, with the moniker “Spooky.” According to Flores, Morales was a member of Puente 13, and Moreno was an associate of Puente 13. When Moreno testified, he denied being a member of Puente 13.

In May 1999, Moreno was 29 years old and Flores was 21 years old. Flores was an alcoholic. On May 28, 1999, he had been drinking all day. He had also taken codeine and “painkillers.”

Flores and Moreno were visiting Morales when he asked them to go with him to drop off some drugs. Flores admittedly knew that his role was to provide protection. Flores had a .25-caliber semiautomatic. Moreno had a .38-caliber revolver. Each of them testified that he carried a gun for protection because he had been shot once before.

After they arrived at Virgen's house, everyone sat around the living room, drinking beer and using methamphetamine, for about 45 minutes. At some point, Virgen and Morales left the room together.

About 15 or 20 minutes later, Ralph went out the sliding glass door. Just before that, according to Flores, Ralph made a hand signal to Richard. Flores testified that he told Moreno, "Keep an eye on him." Moreno did not remember this.

About a minute later, Ralph came back in. He had something shiny in his hand, which Flores believed was a gun. Moreno heard Flores say, "What's going on? What the hell?" He turned and saw Ralph pointing a black revolver at them. According to Moreno, Ralph said, "Give Richard the rest of the fucking dope." They responded, "What dope? We ain't got no dope."¹

Ralph said, "Fuck it, Rich," and started moving toward them. They both told him to stop. He did not respond. They began backing up toward the closed front door. Flores drew his gun and pointed it at Ralph. After that, Moreno drew his gun, too.

¹ Under questioning by Moreno's counsel, Flores added that Ralph said "something about dope," and defendants "might have" said that they did not have any dope. He admitted, however, that he had never previously testified to this.

They were almost up against the front door. According to Moreno, Ralph lunged at them. According to Flores, Ralph tried to grab his gun. Flores, believing his life was in danger, fired. He denied intending to kill Ralph. He tried to aim down, at Ralph's legs.

Moreno heard a shot but was not sure who had fired. He, too, feared for his life. He started shooting. Flores and Moreno then ran out the door.

As Flores was driving away, he realized that he was shot in the left foot. He concluded that he must have shot himself. He displayed the scars at trial. However, neither a bullet casing nor an expended bullet matching this shot was found at the scene.

II

INSTRUCTION THAT AN INITIAL AGGRESSOR

CANNOT INVOKE HEAT OF PASSION VOLUNTARY MANSLAUGHTER

Defendants contend that the trial court erroneously modified the standard heat of passion instruction.

A. *Additional Factual and Procedural Background.*

The prosecution requested Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 570, regarding heat of passion. It also requested a special instruction to the effect that heat of passion required that the defendant could not be the "original aggressor." In support of the requested special instruction, the prosecutor cited *People v. Johnston* (2003) 113 Cal.App.4th 1299.

Counsel for Moreno objected that the prosecution's requested instruction "reduces the [g]overnment's burden of proof [by] throwing this additional element in there."

Counsel for Flores, on the other hand, stated: "... I absolutely agree that that's the state of the law, that if you are the initial aggressor, this defense is not available to you"

He objected, however, that CALCRIM No. 570 was already adequate to convey this principle.

The trial court decided that, rather than give the special instruction, it would modify CALCRIM No. 570 in conformity with the special instruction. Counsel for both defendants objected to the proposed modification. However, they also argued that, if the court did give the proposed modification, it should also "tell the jury that they would have to find beyond a reasonable doubt that [the defendant] is the initial aggressor"

The trial court therefore decided that it would further modify the instruction: "So that last paragraph will read as follows: 'The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion, or that the defendant was *not* the original aggressor. If the People have not met this burden, you must find the defendant not guilty of murder.'" (Italics added.) Defendants' counsel did not object to this wording.

Later, the trial court read this modification out loud to counsel again, including the wording that "[t]he People have the burden of proving . . . that the defendant was *not* the original aggressor." (Italics added.) Once again, defendants' counsel did not object to this wording.

Accordingly, the trial court ultimately instructed the jury: “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. *But this principle of law is not available to the defendant if he is determined to be the initial aggressor.*”

(Modification in italics.)

It further instructed: “The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion, *or that the defendant was not the original aggressor.* If the People have not met this burden, you must find the defendant not guilty of murder.” (Modification in italics.)

B. *Statement That Heat of Passion Principles Are Not Available to the “Original Aggressor.”*

The statement that heat of passion principles are not available to the initial aggressor was based on *People v. Johnston, supra*, 113 Cal.App.4th 1299. There, the defendant had gone to his ex-girlfriend’s house at 5:00 a.m., “bang[ed] on the walls, windows, and doors” and threatened to kill the entire family. (*Id.* at p. 1304.) He repeatedly challenged the ex-girlfriend’s brothers to fight. One brother came out and started fighting with the defendant. (*Ibid.*) The defendant then pulled out a knife and stabbed him. (*Id.* at p. 1305.)

A jury found the defendant guilty of second degree murder. On the defendant’s motion for new trial, the trial court reduced the conviction to voluntary manslaughter. (*People v. Johnston, supra*, 113 Cal.App.4th at p. 1303.) It reasoned that, although the

defendant had used provocative words, the victim had been the first to use physical force. (*Id.* at pp. 1308-1310.)

The appellate court reversed. (*People v. Johnston, supra*, 113 Cal.App.4th at p. 1314.) It held that a person who provokes a fight cannot claim that he was provoked into killing his opponent (at least when his opponent responds with less than deadly force). (*Id.* at pp. 1303, 1312-1313.) “[I]t was [the defendant] who instigated the fight with [the victim] by creating a loud disturbance at the residence, cursing the mother of the victim and girlfriend and, most particularly, challenging [the victim] to come out and fight. Having done that, he cannot be heard to assert that *he* was provoked when [the victim] took him up on the challenge.” (*Id.* at p. 1313.)

Defendants argue that the challenged instruction misstates the holding of *Johnston* because the instruction referred to the “original aggressor,” whereas *Johnston* was dealing with what one might call the “original provocateur.” They note that a defendant who was the original aggressor (defined as the first to use physical force) may still be entitled to claim heat of passion, just as long as the victim was the original provocateur (defined as the first to use provocation). (See *People v. Valentine* (1946) 28 Cal.2d 121, 136-144.)

We agree that the instruction was at least potentially ambiguous. The dictionary definition of an “aggressor” is the one “who makes the first attack, *or* takes the first step in provoking a quarrel.” (Oxford English Dict. (2d ed. 1989) <http://dictionary.oed.com/cgi/entry/50004423>, as of May 7, 2010, italics added.) Thus, it does not necessarily mean the first who actually uses physical force. It can simply mean the first who

threatens to use physical force — who is hostile or “aggressive.” Moreover, it *can* mean the first person to engage in provocation. Admittedly, however, it does not make this meaning as clear as when the word “provocation” is used.

Johnston used the word “aggressor” only once. It quoted *People v. Hoover* (1930) 107 Cal.App. 635 to the effect that: “. . . ‘It may not be reasonably contended . . . that one who has instigated a quarrel, who is himself the aggressor and who in good faith has failed to desist and withdraw from the fistic encounter, may resort to the use of a deadly weapon and then escape from the penalty of murder on the theory that it was the fault of a sudden quarrel or that the fatal act was the result of mere heat of passion.’ [Citations.]” (*People v. Johnston, supra*, 113 Cal.App.4th at p. 1312.) Thus, in context, both *Johnston* and *Hoover* were using “aggressor” to mean one who instigates a quarrel, not one who first uses physical force.

It would have been better to instruct the jury — as the jury in *Johnston* was instructed — that “[p]rovocation can only reduce murder to manslaughter when the victim actually initiated the provocation.” (*Johnston, supra*, 113 Cal.App.4th at p. 1305.) Nevertheless, on the facts of this case, the distinction between an “aggressor” and a “provocateur” was insignificant. If Ralph provoked defendants at all, he did so by advancing on them aggressively, with a gun or other object in his hand. This made him not only a provocateur, but an aggressor. If, on the other hand, defendants engaged in any provocation, they did so by drawing their guns and demanding money. Again, this made them not only provocateurs, but aggressors. As Flores’s trial counsel aptly observed:

“[U]nder the facts of this case, . . . whoever was the initial aggressor . . . is the one who did the provoking . . . , whoever that was. [¶] . . . [T]here are other situations where the provocation might be entirely verbal and the first physical aggression comes from the other party. But that’s a fact situation we don’t have before us.”

Accordingly, the difference between an aggressor and a provocateur was not so ““closely and openly connected to the facts”” before the court as to require an instruction distinguishing them. (See *People v. Burney* (2009) 47 Cal.4th 203, 246.) There was no reasonable likelihood that the jury misunderstood or misapplied the modified instruction. And finally, even assuming the instruction was erroneous, we are convinced beyond a reasonable doubt that it could not possibly have had any effect on the jury’s verdict.

In a subsidiary argument, defendants also claim that the modified instruction “arguably” violated the doctrine of the law of the case. Not so. Our previous opinion held that there was sufficient evidence of heat of passion voluntary manslaughter, and hence that the trial court erred by refusing to instruct on this theory. We further held that the error was prejudicial because the first jury rejected the prosecution’s felony-murder theory, and thus evidently determined that Ralph was the original aggressor. We did not hold, however, that Ralph was the original aggressor as a matter of law; we left this to be redetermined by a properly instructed jury. Thus, the trial court did not err by instructing the jury to make this determination.

C. *Statement That the Prosecution Had to Prove that Defendants Were Not the Original Aggressors.*

The trial court did err by instructing that the prosecution had the burden of proving that defendants were *not* the original aggressors. Obviously, the word “not” should have been omitted.

Defendants’ trial counsel did not forfeit this contention by failing to object below. (Pen. Code, § 1259; *People v. Gamache* (2010) 48 Cal.4th 347, fn. 13.) Moreover, they did not invite the error by asking the trial court to modify the standard instruction; they clearly asked it to instruct that the prosecution had the burden of proving that the defendant *was* the original aggressor.

Even so, when we view the instructions in their entirety, as we are required to do (*People v. Carrington* (2009) 47 Cal.4th 145, 192), we conclude the error could not have prejudiced defendant. The trial court had only just instructed that heat of passion principles do not apply if the defendant is the original aggressor and that the prosecution had the burden of proving that the defendant did not kill in the heat of passion. More generally, it also instructed the jury that the prosecution had the burden of proving each defendant guilty beyond a reasonable doubt. (CALCRIM No. 220.) It would have been absurd — even to a lay juror — to suppose that the prosecution had to prove that the defendant was *not* the original aggressor. Such a self-evident mistake may be deemed harmless. (*People v. Ghent* (1987) 43 Cal.3d 739, 763 [instruction using the word “reasonable” rather than “unreasonable” could not have prejudiced the defendant where

no reasonable juror would have misunderstood it]; *People v. DeRango* (1981) 115 Cal.App.3d 583, 591 [jury could not have misunderstood limiting instruction, despite erroneous omission of the word “not”]; *People v. Long* (1970) 6 Cal.App.3d 741, 749-750 [instruction that “a prior felony conviction may establish guilt,” erroneously omitting the word “not,” was not prejudicial].)

People v. Rich (1988) 45 Cal.3d 1036 is practically on point. There, the trial court erroneously instructed the jury that, if it was *not* satisfied beyond a reasonable doubt that the killing was unlawful, but it had a reasonable doubt whether the crime was murder or manslaughter, it should find the defendant guilty of manslaughter. The Supreme Court held: “Even as read, we believe the instruction, reasonably interpreted, adequately conveyed the meaning . . . , and that, in the context of the instructions as a whole, it did not misinform the jury to defendant’s prejudice” (*Id.* at p. 1111, fn. 19.)

Although trial counsel’s failure to object does not constitute a waiver, it does indicate that those present at the time did not think the instruction would be misunderstood. (*People v. Long, supra*, 6 Cal.App.3d at p. 750.) Moreover, in closing argument, the prosecutor made it clear that it was his position (thus implying that he had the burden of proving) that defendants were the original aggressors.

We therefore conclude that the error was not prejudicial.

III

INSTRUCTIONS ON SELF-DEFENSE CLAIMS

BY AN ORIGINAL AGGRESSOR

Defendants contend that the trial court erred by instructing that a defendant cannot claim perfect or imperfect self-defense if he created circumstances that legally justified his adversary's attack.

A. *Additional Factual and Procedural Background.*

The prosecution requested a special instruction which, as ultimately given, stated: "The principles of self-defense and imperfect self-defense may not be invoked by a defendant who, through his own wrongful conduct, has created circumstances under which his adversary's attack or pursuit is legally justified."

In support of this special instruction, the prosecutor cited *People v. Randle* (2005) 35 Cal.4th 987, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *In re Christian S.* (1994) 7 Cal.4th 768; and *People v. Vasquez* (2006) 136 Cal.App.4th 1176. He also noted that former CALJIC No. 5.17 had contained similar wording.

Counsel for Moreno objected. He conceded that the special instruction did correctly state the case law, but he argued, "I don't think we have [that] situation in this case." Counsel for Flores joined in this objection.

The trial court ruled that it would give the special instruction.

B. *Analysis.*

Preliminarily, we questioned whether defendants invited the asserted error by conceding below that the special instruction correctly stated the law. “However, ‘[t]he invited error doctrine will not preclude appellate review if the record fails to show counsel had a tactical reason for requesting or acquiescing in the instruction. [Citations.]’ [Citation.]” (*People v. Harris* (2008) 43 Cal.4th 1269, 1299.) No such tactical purpose appears here. Hence, we turn to the merits.

“Self-defense is *perfect* or *imperfect*. For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.] A killing committed in perfect self-defense is neither murder nor manslaughter; it is justifiable homicide. [Citations.]

“‘One acting in imperfect self-defense also actually believes he must defend himself from imminent danger of death or great bodily injury; however, his belief is unreasonable. [Citations.]’” (*People v. Randle, supra*, 35 Cal.4th at p. 994.) “‘Under the doctrine of imperfect self-defense, . . . the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.’ [Citation.]” (*Id.* at p. 995.)

In *In re Christian S., supra*, 7 Cal.4th 768, the California Supreme Court stated: “It is well established that the ordinary self-defense doctrine — applicable when a defendant reasonably believes that his safety is endangered — may not be invoked by *a defendant who, through his own wrongful conduct* (e.g., the initiation of a physical assault

or the commission of a felony), *has created circumstances under which his adversary's attack or pursuit is legally justified*. [Citations.] It follows, a fortiori, that *the imperfect self-defense doctrine cannot be invoked in such circumstances*. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction if the felon killed his pursuer with an actual belief in the need for self-defense.” (*Id.* at p. 773, fn. 1, original italics omitted; italics added.)

The challenged instruction repeated almost verbatim the footnote from *Christian S.* It has been held that such an instruction is “legally correct.” (*People v. Hardin* (2000) 85 Cal.App.4th 625, 634.) Defendants nevertheless argue that it was erroneous here, essentially for three alternative reasons.

First, defendants argue that the instruction failed to define either “wrongful conduct” or “legally justified.” “We must consider whether it is reasonably likely that the trial court’s instructions caused the jury to misapply the law. [Citations.]” (*People v. Carrington, supra*, 47 Cal.4th at p. 192.)

Although “wrongful conduct” was not further defined, in context, it had to be conduct that could and would cause an adversary’s attack or pursuit to be legally justified. And the trial court did not wholly fail to define “legally justified.” To the contrary, it did instruct that a person is “justified” and is “act[ing] in lawful self-defense” if he reasonably believes he is in imminent danger of death or great bodily harm, if he reasonably believes that the immediate use of deadly force is necessary to defend against

the danger, and if he uses no more force than is reasonably necessary. (CALCRIM No. 505.) This was adequate to inform the jury that Ralph had the right to use force if, and only if, defendants were the original aggressors, and vice versa.

Defendants argue that the jury could have misunderstood “wrongful conduct” to refer to the fact that they were using or selling methamphetamine. There was no reasonable likelihood, however, that the jury would have believed that Ralph was legally justified in attacking them for this reason.

Even more fancifully, defendants also suggest that the jury could have misunderstood “wrongful conduct” to refer to the fact that they were carrying weapons or sporting gang tattoos. Ralph, however, had no way of even knowing that they were carrying weapons until after he had attacked them (or, of course, after they had attacked him, thus justifying his response). While it is inferable that Ralph saw the tattoos, there was no evidence that they upset him or caused him to attack defendants. In any event, no juror would have understood the instructions to mean that Ralph was legally justified in assaulting someone merely because they had a gang tattoo.

Second, defendants argue that instruction failed to explain that even an original aggressor can still claim self-defense if: (1) he attempts to withdraw (see *People v. Crandell* (1988) 46 Cal.3d 833, 871), or (2) he uses less than deadly force and his adversary responds with deadly force (*id.* at pp. 871-872). There was no evidence, however, that defendants were the original aggressors but thereafter attempted to withdraw. Admittedly, they did back away from Ralph and toward the front door. Even

so, there was no evidence that they did anything that reasonably would have indicated that they had “declined further combat” or “abandoned the affray.” (*People v. Watie* (2002) 100 Cal.App.4th 866, 877.) They continued to face Ralph, with guns drawn; they did not verbally indicate that they were withdrawing. Their backing away was merely avoidance of Ralph’s fists, not withdrawal. (See *People v. Hernandez* (2003) 111 Cal.App.4th 582, 589-590 [moving back from victim’s punch while reaching for a brick to hit him with did not constitute withdrawal] [Fourth Dist., Div. Two].)

Similarly, there was no evidence that defendants were the original aggressors, but that they used less than deadly force. Either defendants drew their guns, which would constitute deadly force, or else they were not the original aggressors at all.

Third, and finally, defendants argue that the *Christian S.* footnote, when read properly and in light of other California Supreme Court cases (e.g., *People v. Barton* (1995) 12 Cal.4th 186; *People v. Flannel* (1979) 25 Cal.3d 668), means that an original aggressor loses the right to claim imperfect self-defense if he or she acts under an unreasonable mistake of law, not an unreasonable mistake of fact. In other words, if one person attacks another because he unreasonably believes he has the legal right to do so, imperfect self-defense does not apply. If, on the other hand, one person attacks another because he unreasonably believes the other is about to attack him, imperfect self-defense *does* apply.

Assuming, without deciding, that this is a correct statement of the law, the error was harmless under any standard. The key factual issue was who was the original

aggressor — defendants or Ralph. As the trial court put it, “It’s . . . the Showdown at the OK Corral, it’s who pulled their guns first.” If the jury found that Ralph was the original aggressor (or if it had a reasonable doubt as to who was the original aggressor), defendants could claim *perfect* self-defense.

If, on the other hand, the jury found that defendants were the original aggressors, the instruction correctly informed the jury that defendants could not claim either perfect or imperfect self-defense. This was true even if they honestly believed that Ralph’s violent response threatened their lives. Assuming that the *Christian S.* footnote does indeed apply only to a mistake of law, this would have been just such a mistake of law.

There was no evidence of any mistake of fact. Defendants seem to be claiming that the jury could have found that they *mistakenly* believed that Ralph was the original aggressor, even though they were *actually* the original aggressors. Not so. In Richard’s account, Ralph did nothing that defendants could have construed, even mistakenly, as aggressive until after defendants drew their guns and demanded “stuff.” By contrast, in defendant’s account, Ralph was the clear aggressor.

We therefore conclude that it was not prejudicial error to give the prosecution’s requested special instruction.

IV

FAILURE TO MOVE TO BIFURCATE

THE GANG ENHANCEMENT ALLEGATIONS AS INEFFECTIVE ASSISTANCE

Defendants contend that their trial counsel rendered constitutionally ineffective assistance by failing to move to bifurcate the gang enhancement allegation.

““In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]’ [Citation.]” (*People v. Gamache, supra*, 48 Cal.4th at p. 391.)

In this case, defendants’ trial counsel have never been asked why they did not move to bifurcate the gang allegations. This is not a case in which there could be no

satisfactory explanation; trial counsel reasonably could have concluded that the trial court was not likely to grant such a motion.

A trial court does have discretion to bifurcate the trial of a gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1044, 1049.) However, “the trial court’s discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged. [Citation.]” (*Id.* at p. 1050.)

“[A] criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation. [Citation.]” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.) “To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.] [¶] Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself — for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged — a court may still deny bifurcation.” (*Id.* at pp. 1049-1050.)

“Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.] “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial

effect, and wide latitude is permitted in admitting evidence of its existence.” [Citations.]’ [Citations.] Gang evidence is also relevant on the issue of a witness’s credibility. [Citations.]” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168.)

Here, Detective Skahill testified (in hypothetical form) that both the robbery and the shooting were committed to benefit the gang. Among other things, he testified that gang members respond to disrespect with violence, and that they would have viewed Ralph’s resistance as disrespect. The gang evidence also supported an inference that defendants were privy to Morales’s intention to commit a robbery. Moreover, it tended to explain why both defendants were carrying guns. Finally, it was relevant to witness credibility. For example, it suggested an innocent reason for some of the inconsistencies and apparent evasions in Virgen’s testimony. It was also relevant to defendants’ own credibility as witnesses.

This was not a case in which the gang evidence was “so extraordinarily prejudicial . . . that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) While the predicate offenses used to show a pattern of gang activity included murder, kidnapping, and torture, the prosecution did not go into these crimes in detail, and it was made clear that they had been committed by other gang members, not by defendants. Moreover, it did not appear that they were factually similar to the charged murder.

Separately and alternatively, defendants cannot show that counsel's asserted ineffective assistance was prejudicial, again because the trial court was not likely to grant a bifurcation motion.

We therefore conclude that defendants have not shown that their trial counsel rendered ineffective assistance by failing to move to bifurcate the gang enhancement allegations.

V

THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE GANG ENHANCEMENT

Defendants contend that there was insufficient evidence to support the gang enhancement.

“In reviewing the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the [enhancement] beyond a reasonable doubt.” [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 919.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

A gang enhancement requires that the defendant commit the underlying felony both (1) “for the benefit of, at the direction of, or in association with any criminal street gang” and (2) “with the specific intent to promote, further, or assist in any criminal conduct by gang members” (Pen. Code, § 186.22, subd. (b)(1).) “[E]xpert testimony is admissible on the issue of “whether and how a crime was committed to benefit or promote a gang.” [Citations.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 621 [Fourth Dist., Div. Two].)

A. *The “Benefit/Direction/Association” Element.*

Detective Skahill opined that an offense like the present one would be committed to benefit the gang. He explained, in part, that gangs “have to provide money for their existence.” “[T]hey went there to rob them to make money for the gang.”

Defendants argue that this explanation largely addressed the planned robbery, not the unplanned murder. Nevertheless, force or fear is an element of robbery. (Pen. Code, § 211.) By pulling out their guns while demanding “stuff,” defendants clearly threatened to kill those present if they did not comply. The shooting was committed to facilitate the robbery and therefore also for the benefit of the gang.

In any event, Detective Skahill also testified that the shooting in particular was committed to enforce respect for the gang. Gangs define respect as notoriety, intimidation, and fear. They benefit from respect because it prevents rival gang members and others from “mess[ing] with [them].” Accordingly, they punish disrespect with

violence. Ralph's resistance to defendants' demands would have been viewed as disrespect.

Even assuming there was insufficient evidence that the crime was committed for the *benefit* of the gang, there was at least sufficient evidence that it was committed in *association* with the gang. According to Detective Skahill, gang members who commit crimes bring other gang members along for "mutual aid, mutual support," "because they are not going to rat you out. They are going to back you up." Indeed, "the jury could reasonably infer the requisite association from the very fact that defendant[s] committed the charged crime[] in association with fellow gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [Fourth Dist., Div. Two].) For the reasons already stated, this applies not only to the planned robbery, but also to the unplanned murder.

B. *The "Promote/Further/Assist" Element.*

Defendants assert that the promote/further/assist element required evidence that they "specifically intended to benefit Puente [13] by participating in the shooting of Ralph Avila." Not so. "[S]pecific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members'" (*People v. Morales, supra*, 112 Cal.App.4th at p. 1198.) "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]" (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [Fourth Dist., Div. Two].)

There was ample evidence that Moreno, Flores, and Morales all planned to commit a robbery together. To that end, each of them brought along a gun. At approximately the same time as Morales was pulling out his gun and robbing Virgen in the bedroom, defendants were pulling out their guns and attempting to rob Richard and Ralph in the living room. When Ralph resisted, they shot him. On this view of the evidence, clearly they shot him with the specific intent to promote, further, or assist the underlying robbery. At a minimum, they were seeking to secure a safe getaway.

Incidentally, we note that the promote/further/assist element can also be satisfied by evidence that the defendant — himself a gang member — intentionally perpetrated the charged crime. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1306-1308 [dealing with this element of the crime of gang participation, Pen. Code, § 186.22, subd. (a)] [Fourth Dist., Div. Two]; see also *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 6 [Fourth Dist., Div. Two].) There was sufficient evidence that each defendant fired with the intent to kill. Thus, even if we viewed each defendant as acting alone, there would be sufficient evidence of the necessary specific intent.

VI

THE TERM IMPOSED ON THE GANG ENHANCEMENT

Defendants contend that the trial court erred by imposing a three-year term on the gang enhancement.

When the crime was committed, the effect of a gang enhancement in most cases was an additional determinate term of one, two, or three years. (Former Pen. Code,

§ 186.22, subd. (b)(1), Stats. 1997, ch. 500, § 2, p. 3125.) However, when the underlying felony is punishable by imprisonment in the state prison for life, its effect was a 15-year minimum parole period. (Former Pen. Code, § 186.22, subd. (b)(4).) This was in lieu of the determinate term that would otherwise apply. (Former Pen. Code, § 186.22, subd. (b)(1) [“[e]xcept as provided in paragraph (4)”]; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236-1237; *People v. Harper* (2003) 109 Cal.App.4th 520, 524-527.)

The People concede that the trial court erred. We will modify the judgment accordingly.

VII DISPOSITION

The three-year term imposed on the gang enhancement is stricken. Instead, defendants shall be subject to a 15-year minimum parole period. (See part VI, *ante*.)

The judgment as thus modified is affirmed. The trial court is directed to amend the sentencing minute order and the abstract of judgment and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:
HOLLENHORST
Acting P.J.

KING
J.